Nos. 09-1454, 09-1478

IN THE

# Supreme Court of the United States

BOB CAMRETA,

*Petitioner,*

*v.*

SARAH GREENE, personally and as next friend for S.G., a minor, and K.G., a minor,

*Respondent.*

JAMES ALFORD,
Deschutes County Deputy Sheriff,

*Petitioner,*

*v.*

SARAH GREENE, personally and as next friend for S.G., a minor, and K.G., a minor,

*Respondent.*

ON WRITS OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

## BRIEF FOR LEGAL SERVICES FOR CHILDREN AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

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## STATEMENT OF INTEREST[1]

The mission of Legal Services for Children ("LSC") is to ensure that all children and youth have an opportunity to be raised in a safe environment with equal access to a meaningful education and the services and support they need to become healthy and productive young adults. This mission is rooted in the belief that young people need strong families and deserve positive alternatives to unnecessary placement in foster care, juvenile justice facilities, and immigration detention. Founded in 1975, LSC provides free legal and social work services to children and youth in the San Francisco Bay Area. LSC represents children and youth in guardianship, dependency, school discipline, immigration, emancipation, and restraining order proceedings.

As a law firm that regularly represents abused and neglected children in child protective proceedings, LSC understands the necessity for, and regularly interacts with, government agencies charged with protecting children who cannot safely remain with their families. To further the goal of protecting the safety and well-being of children, LSC supports the use of investigation techniques narrowly tailored to prevent unnecessary trauma, while eliciting reliable information.

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1. Pursuant to Supreme Court Rule 37.6, counsel for amicus represents that it authored this brief in its entirety and that none of the parties or their counsel, nor any other person or entity other than amicus or its counsel, made a monetary contribution intended to fund the preparation or submission of this brief. The Court's docket confirms that counsel for the parties have executed blanket consents to the filing of amicus briefs.

LSC also regularly represents children in school discipline, special education, and related education matters. To further the goal of ensuring that all children have the opportunity to receive a meaningful education, LSC advocates for fundamentally fair proceedings in which due process is upheld. Given the serious consequences that attend exclusion from school and the poor outcomes for young people who are excluded from school, LSC advocates against efforts to dilute the right of students to be free from unreasonable searches and seizures.

LSC believes that it is unnecessary to dilute the rights of one group of children in order to protect another. Public systems designed to protect children and aid efforts to stop child abuse are not compromised by the application of Fourth Amendment protections in the school setting. Most significantly, LSC seeks careful decision-making from courts at all levels in cases such as the one at bar which could have profound implications in many areas of children's law.

## SUMMARY OF THE ARGUMENT

Certiorari was improvidently granted, and the petitions for writ of certiorari filed by Bob Camreta ("Camreta") and Deschutes County Deputy Sheriff James Alford ("Alford") should be dismissed.

Protection of children, particularly in the context of constitutional decision-making, deserves careful consideration in reference to the facts at issue to avoid unintended consequences. Since this Court began to articulate the rights of children in decisions in different areas of law over 30 years ago, this Court has recognized

the rights of children in several legal settings. *See, e.g., In re Gault*, 387 U.S. 1, 14-15 (1967); *McKeiver v. Pennsylvania*, 403 U.S. 528, 545-47 (1971); *In re Winship*, 397 U.S. 358 (1970); *Schall v. Martin*, 467 U.S. 253, 263 (1984). The developing body of law respecting children's rights has been careful to recognize the special needs of children, but never at the expense of their humanity and the rights that accompany that humanity in the United States. This Court protects them, but as rights-bearing individuals. This case represents another critical juncture in the development of law affecting children's rights. If the Court proceeds to rule in this case, its decision will reverberate in several areas of law including juvenile justice, child protection, Fourth Amendment, education law, the role of law enforcement in relation to youth in schools, the role of educators in relation to law enforcement investigations of school and non-school related events, and more. This Court must not weigh in where unintended consequences will result for children, in an unknowable variety of settings. The circumstances that bring this matter before this Court fail to present a live factual scenario because there is no harmed party for whom this Court's decision would change any outcome. This Petition seeks an advisory opinion because there is also no split among circuits about how to resolve the question discussed and decided by the Ninth Circuit. Where there is no live controversy, this Court is relegated to the legislative role of determining policy. Where this Court becomes a creator and implementer of policy, it becomes a target for several entities with policy agendas. In other words, it encourages amicus briefs urging the court to ignore the factual scenario in front of it and make broad brush policy strokes that those organizations want to see put in place. As this Court has long recognized:

> The requirement of actual injury redressable by the court . . . serves several of the implicit policies embodied in Article III. It tends to assure that the legal questions presented to the court will be resolved, not in the rarified atmosphere of a debating society, but in a concrete factual context conducive to a realistic appreciation of the consequences of judicial action. The standing requirement serves other purposes. Because it assures an actual factual setting in which the litigant asserts a claim of injury in fact, a court may decide the case with some confidence that its decision will not pave the way for lawsuits which have some, but not all, of the facts of the case actually decided by the court.

*Bender v. Williamsport Area School Dist.*, 475 U.S. 534, 542-43 (1986) (citations and quotation marks omitted). This case highlights the risk of attempting to address important issues of constitutional law absent the crucible of well-developed facts and truly contested, determinative issues of law. Indeed, the breadth and scope of positions taken by several Amici in this case bear that out where they are improperly seeking to amend the question presented to this Court.

Amicus briefs filed at the time of Petitioners' briefs seek the blessing of this Court for actions that this Court cannot properly consider in light of the path that this case has taken to this highest Court, and the circuit court's clear and correct rulings on qualified immunity for the state actors involved. It is not merely because amicus briefs have attempted to enlarge the question before this

Court that should cause this case to be dismissed. Rather, LSC contends that there is no legal basis to hear this case because it is moot, Petitioners have no standing and only an advisory opinion is being sought. It is the content of the Amicus briefs filed concurrently with Petitioners' that illustrate the imprecision of the record and therefore the questions in this case, and that has inspired them to attempt to mold an unclear proposition into many different questions not properly before this Court. A properly preserved and presented set of facts in a future case is the only vehicle that would allow this self-disciplined Court to review any actual residual Fourth Amendment questions when the facts of a case warrant such review and a split of circuits makes such review critical.

## ARGUMENT

### CERTIORARI WAS IMPROVIDENTLY GRANTED AND THE WRIT OF CERTIORARI SHOULD BE DISMISSED

Petitioners present no question that will alter the outcome of this matter for any party involved. The court of appeals affirmed the decision of the district court granting summary judgment in their favor on Respondent's § 1983 claim. Petitioners seek nothing more than an advisory opinion from this Court concerning the constitutional constraints upon law enforcement when law enforcement seeks to seize a child and conduct an in-school interrogation regarding events that are not school-related.

## I. Petitioners and Amici writing in support of Petitioners seek advisory opinions and present no justiciable case or controversy under Article III.

Petitioners and the Amici writing in support of Petitioners fail to present a justiciable case or controversy. The "case or controversy" language of Article III of the U.S. Constitution limits the jurisdiction of federal courts to "questions presented in an adversary context and in a form historically viewed as capable of resolution through the judicial process." *Flast v. Cohen*, 392 U.S. 83, 95 (1968). There is no justiciable case or controversy where, as here, a petitioner seeks an advisory opinion, when the question presented has been mooted, or when there is no standing to maintain an action. *Id.* at 95.

Petitioners who prevail in the action below may not appeal from a favorable judgment simply to seek review of findings that are "uncongenial" or that they "deem[] erroneous." *Mathias v. Worldcom Technologies, Inc.*, 535 U.S. 682, 684 (2002).

The substantive question on which Petitioners seek review is whether the traditional Fourth Amendment warrant/warrant exception analysis applies to the facts of the case, or whether the appropriate test is the reasonableness standard used when a witness is "temporarily detained," which balances an individual's privacy rights against the state's interests. Camreta Petition for Certiorari at i. *See also* Alford Petition for Certiorari at i. This claim is not justiciable and should be dismissed. *See Spencer v. Kemna*, 523 U.S. 1, 18 (1998).

### A. Petitioners Seek an Advisory Opinion Relating to Future Hypothetical Seizures.

Neither Petitioners nor Respondent have a direct, personal stake in the outcome of this appeal – Respondent did not appeal the court of appeals' holding that Petitioners are entitled to qualified immunity, which ended the underlying claims against Petitioners, and Petitioners will not be personally affected by the outcome of the questions on appeal. In the absence of an issue for which effective relief can be granted, Petitioners highlight in their briefs future, potential seizures and seek an advisory opinion in violation of Article III.

Sarah Greene, on behalf of herself, and her minor children, S.G. and K.G. (collectively, "Respondent"), sued Petitioners Camreta and Alford, along with Alford's employer Deschutes County and others after they seized the nine-year-old girl in a school and questioned her for two hours about whether she had been sexually abused by her father. *Greene v. Camreta*, 588 F.3d 1011, 1020 (9th Cir. 2009). Respondent argued that Camreta and Alford violated S.G.'s right to be free from unreasonable seizure under the Fourth Amendment. *Greene v. Camreta*, 2006 U.S. Dist. LEXIS 16764, *1 (D. Or. Mar. 23, 2006). Petitioners moved for summary judgment. *Id.* at * 2.

The district court found the removal of S.G. from the classroom was a seizure of reasonable length in light of the facts and circumstances. *See id.* at * 7-11. The district court applied the standard set forth in *Terry v. Ohio*, 392 U.S. 1 (1968), that this seizure was reasonable because it was "justified at its inception," and the seizure of S.G. was "reasonably related in scope to the circumstances

which justified the interference in the first place." *Terry*, 392 U.S. at 20. The district court also held that the Petitioners were entitled to qualified immunity because reasonable officials could believe their actions were within constitutional bounds. *Id.* at * 11-13. The district court granted Petitioners' motions for summary judgment on the Fourth Amendment allegation. *Id.* at * 25. Respondent appealed.

On appeal, Petitioners did not contest the district court's ruling that the two-hour interview of S.G. was a seizure. *Greene*, 588 F.3d at 1022. Rather, the court of appeals considered whether "the warrantless, in-school interview of S.G. violated S.G.'s Fourth Amendment rights" in light of that concession. *Id.*

The Ninth Circuit reviewed and rejected application of the balancing of interests test from *New Jersey v. T.L.O.*, 469 U.S. 325 (1985), citing the distinction between the searches and seizures conducted by school officials in *T.L.O.* and its progeny, and the seizure of S.G. by a state social services worker and a deputy sheriff. *Greene*, 588 F.3d at 1023-25. The court of appeals then considered the applicability of the "special needs" doctrine. *Id.* at 1025-31. The court of appeals looked precisely at Oregon law to determine that a child protective services investigation under that law is "'so intimately intertwined with law enforcement' as to render the 'special needs' doctrine inapplicable." *Id.* at 1028 (quoting *Roe v. Tex. Dep't of Protective & Regulatory Servs.*, 299 F.3d 395, 407 (5th Cir. 2002)). The court of appeals applied the "traditional Fourth Amendment requirements" and found "the decision to seize and interrogate S.G. in the absence of a warrant, a court order, exigent circumstances or parental

consent was unconstitutional." *Greene*, 588 F.3d at 1030. Rejecting any claim to exigent circumstances, the court of appeals found it significant that Petitioners waited three days between receiving the abuse report and interrogating S.G., and that Petitioners returned S.G. to her parents' custody after the allegedly incriminating interview. *Id.* at n.17.

The court of appeals evaluated whether the unconstitutionality of the seizure of S.G. was "clearly established" both under the court of appeals' holding concerning the applicability of warrant requirements and under the "lesser, 'special needs' reasonableness standard" Petitioners argued was applicable. *Id.* at 1030-31. Faced with a summary judgment, and thus lacking any findings of fact, the circuit court determined that Petitioners could have believed that the seizure of S.G. was justified at its inception but opined that it was a close question whether the seizure of S.G. was reasonable in scope. *Id.* at 1031. The court of appeals found that "[i]t is far from clear that it was reasonable" for Petitioners to detain and interrogate S.G. – a 9 year-old – for over an hour during which she claimed to have consistently denied any abuse, but "mindful of the difficult task facing social services caseworkers," it held that Petitioners were entitled to qualified immunity. *Id.* at 1032-33.

Notwithstanding that Petitioners prevailed at the district court and court of appeals, that they face no damages or injunctive relief, and that they seek to preserve the Ninth Circuit's ruling with respect to their lack of liability in this case, they sought certiorari. Because they seek review in a procedural posture in which they ask this Court not to undertake any analysis that may

affect the judgment in their favor, Petitioners focus on hypothetical seizures.

Camreta asserts that "***a*** seizure of ***a*** suspected child-abuse victim at her school ***is reasonable at its inception***." Camreta Brief 24 (emphasis added). *See also id.* at 34 ("This Court should thus conclude that seizures to investigate an allegation of child abuse by talking with the child at her school are constitutional at their inception."); 38 ("Having established that seizures of this sort are reasonable at their inception . . .").

Alford similarly concentrates on hypothetical seizures of hypothetical students: "Here, properly analyzed, a government official (including a police officer) acts reasonably when he or she, without a warrant, seizes a school-child based upon a reasonable suspicion that the child has suffered abuse and needs protection." Alford Brief 45. *See also id.* at 49 ("Seizures of this Type are Reasonable Because They Minimally Intrude on a Child's Privacy Interests"); 53 ("The Means by Which Seizures of this Type are Accomplished are Not Seriously Invasive").[2]

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2. This case was disposed against Respondent and in favor of Petitioners on summary judgment and was reviewed by the court of appeals in that posture. Thus, development of the surrounding facts has been truncated, and there has been no resolution of disputed facts. Indeed, as this Court has indicated, issues of qualified immunity are to be resolved with limited or no discovery and at the earliest possible stage in litigation. *See Pearson v. Callahan*, 129 S. Ct. 808, 815 (2009). But fully-developed facts are particularly critical in constitutional cases. *See Bender v. Williamsport Area School Dist.*, 475 U.S. 534, 542 & n.5 (standing requirements to be applied strictly in deciding constitutional questions; "We have frequently recognized the importance of facts and the factfinding process in constitutional adjudication.")

Even Petitioners reveal their understanding that the record here is devoid of enough facts for this Court to make a determination on the Fourth Amendment question, where they have carefully changed the issue presented from the issue of the scope of the intrusion upon a nine year old girl, to the more narrow assertion that "at its inception," the search was constitutional. Although Camreta asks the Court to declare that the seizure of S.G. was "reasonable at its inception" – a question the court of appeals resolved in Petitioners' favor for qualified immunity, *see Greene*, 588 F.3d at 1031 – he strains to avoid inquiry into what the circuit court termed the "considerably closer question" of whether the seizure was reasonable in scope, particularly on the truncated, summary judgment record before the circuit and this Court. *Id.* at 1031-32. Camreta asks the Court to declare that a balancing test for reasonableness should be applied, but beseeches the Court not to inquire whether his own conduct met the required standards: "because Camreta is entitled to qualified immunity, this Court need not address the reasonableness of the scope of the seizure." Camreta Brief 40. He also concedes that the advisory opinion he seeks will have limited value in allowing officials to know ahead of time whether their actions will be constitutionally permissible: "the precise 'limitations which the Fourth Amendment place upon' an in-school interview of a suspected victim of child abuse 'will have to be developed in the concrete factual circumstances of individual cases.'" *Id.*, quoting *Terry*, 392 U.S. at 29. Alford similarly exhorts that the Court "has held that 'common sense and ordinary human experience must govern over rigid criteria," Alford Brief 56, *citing United States v. Montoya de Hernandez*, 473 U.S. 531, 542-43 (1985).

### B. Non-Parties Deschutes County and the State of Oregon, Writing for Petitioners Alford and Camreta, Respectively, Seek an Advisory Opinion

In the absence of a live controversy concerning Petitioners' liability for the seizure of S.G., the State of Oregon and Deschutes County seek to use Petitioners as marionettes to obtain an advisory opinion concerning the application of Fourth Amendment analysis in hypothetical future investigations.

Camreta's petition, submitted by the Oregon Attorney General, contends that "the State is bound by the Ninth Circuit's ruling in this and all future cases." Camreta Brief 41. *See also id.* 43-44 ("[t]he State of Oregon – which appears on Camreta's behalf here – is bound by the Ninth Circuit's constitutional ruling in future cases").[3]

As with Oregon's references to "future cases," Deschutes County, writing for Alford, focuses on hypothetical seizures: "Seizures of this Type Are Reasonable . . . ." Alford Brief 36. *See also id.* 39, 43, 46, 49, 53 (referring to "Seizures of this Type").

But federal courts cannot issue "an opinion advising what the law would be on a hypothetical state of facts." *Aetna Life Ins. Co. v. Haworth*, 300 U.S. 227, 241 (1937); *see also United States v. Fruehauf*, 365 U.S. 146, 157

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3. Indeed, in the brief it wrote on behalf of Camreta, the State of Oregon pretends that it has been a party to the case under review: "the State received a favorable judgment," *id.* 41; "the state (*sic*) prevailed on qualified immunity grounds . . . ." *Id.*

(1961) (Court will not give "advance expressions of legal judgment on issues which remain unfocused" because they lack the "clear concreteness" of questions that are necessary for decision in a truly adversary argument.). As the Court has repeatedly emphasized, "no justiciable controversy is presented . . . when the parties are asking for an advisory opinion." *Flast, supra*, 392 U.S. at 95. Here, the arguments of Camreta and Alford seek a sweeping declaration of law with respect to future cases that lack the concreteness of a live controversy. No answer to the question presented by the parties will alter the outcome of this case; Camreta and Alford face no liability for their actions in connection with their interrogation of S.G. in 2003. As in *Alvarez v. Smith*, 130 S. Ct. 576, 580-81 (2009), although the parties continue to dispute the lawfulness of the actions and procedures in question, "that dispute is no longer embedded in any actual controversy about the plaintiff's particular legal rights. Rather, it is an abstract dispute about the law" unlikely to affect plaintiff.

### C. Petitioners and Amici Seek Advisory Opinions Concerning Questions Not Presented by the Parties

#### 1. The Decision Under Review Is Narrower Than Represented by Petitioners and Amici Writing in Support of Petitioners

Petitioners here seek to have this Court review a decision in their favor from the Ninth Circuit Court of Appeals, asserting that "[t]he Fourth Amendment does not, as the Ninth Circuit concluded, categorically require a warrant based on probable cause for every seizure." Camreta Brief 14. But the court of appeals indicated

it was "consider[ing] the relatively straightforward question whether an in-school seizure and interrogation of a suspected child abuse victim is ***always permissible*** under the Fourth Amendment without probable cause and a warrant or the equivalent of a warrant . . . ." *Greene v. Camreta*, 588 F.3d at 1022 (emphasis added). The court of appeals studied Oregon law in effect at the time of the events in the case[4] to determine whether a child protective services investigation under that law is "so intimately intertwined with law enforcement as to render the special needs doctrine inapplicable." *Id.* at 1028 (quotation marks and citation omitted). The court of appeals held that using Oregon's state policy of "involving both police officers and caseworkers in the gathering and collection of evidence of child sexual abuse from the outset of an investigation" did not thereby "forge an exception to traditional Fourth Amendment protections for the criminal investigation of child sexual abuse." *Greene*, 588 F.3d at 1029. When the court applied "the traditional Fourth Amendment requirements, the decision to seize and interrogate S.G. in the absence of a warrant, court order, exigent circumstances, or parental consent was unconstitutional." *Id.* at 1030. Petitioners did not contest in proceedings at the court of appeals that their tactics constituted a seizure for Fourth Amendment purposes.

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4. Alford indicates that the Oregon law examined by the court of appeals and discussed at length in his brief has changed since the time of his and Camreta's seizure of Respondent S.G. *See* Alford Brief 8 n. 3. This issue is discussed further in section IV below.

### 2. Amici and Petitioners read the question presented as being much more broad than the question this Court accepted, or ignore it altogether.

Amici writing in support of Petitioners likewise seek to have the Court issue broad declarations concerning application of the law to speculative facts far removed from those at issue in this case, applicable to entities not similarly-situated to parties in the case, and in some cases, to questions of law not disputed in the Ninth Circuit or ever in this case.

**Comparison of Select Questions Presented**

The following table illustrates the breadth of questions Petitioners and Amici seek to have the Court address.

**Camreta Petition for Cert. adopted by this Court and Camreta Merits Brief:**

Should the Ninth Circuit, as other circuits have done, instead have applied the balancing standard that this Court has identified as the appropriate standard when a witness is temporarily detained?

| Brief | Question Presented | Topic for Court |
|---|---|---|
| Alford Merits Brief | Does the Fourth Amendment require a warrant, court order, parental consent or exigent circumstances before law enforcement and child welfare officials may conduct a temporary seizure and interview at a public school of a child whom they reasonably suspect was being sexually abused by her father? | Analysis to be applied to moot set of facts, as to which Petitioners already have judgment in their favor |

| Brief | Question Presented | Topic for Court |
|---|---|---|
| Arizona Prosecutor Attorneys Advisory Council | Absent egregious circumstances, when social workers or peace officers conduct public school interviews of suspected child abuse victims is the Fourth Amendment implicated? | Whether interviews of public school students under any circumstances can be seizures, an issue Petitioners conceded at the court of appeals and that no party briefed to the Court |
| Los Angeles County District Attorney on behalf of Los Angeles County and others | "An Interview of a Child at a Public School Regarding Suspected Abuse Is Not a Seizure Per Se under the Fourth Amendment . . ." p.3. | Application of Fourth Amendment to hypothetical situations |

| Brief | Question Presented | Topic for Court |
|---|---|---|
| Center on the Administration of Criminal Law | "The Center urges the Court to go further, however, and announce a broad, categorical rule that public school and state child services officials do not violate a minor school child's Fourth Amendment rights by conducting an interview of the child predicated on reasonable objective indicia of abuse, even where the interview includes passive participation by law enforcement." p. 3. | Declaration that all "interviews" of suspected victims by public school officials or child services officials, whether or not in school, either: 1) not seizures or 2) are per se reasonable, regardless of circumstances or location |

| Brief | Question Presented | Topic for Court |
|---|---|---|
| Cook County Public Guardian | "This Court should rule that the reasonableness standard set forth in New Jersey v. T.L.O. and Illinois v. Lidster applies to child protection investigations." p. 8. | Question concerning application of Fourth Amendment to hypothetical situations never at issue in this case at any level |
| Camreta Merits Brief | "[A] seizure of a suspected child-abuse victim at her school is reasonable at its inception." p. 24. | Declaration that all seizures of suspected victims at school are reasonable, regardless of facts |

Amici – and Petitioners – seek advisory opinions concerning matters unconnected to the seizure and interrogation of S.G. The prohibition against advisory opinions is "'the oldest and most consistent thread in the federal law of justiciability . . . .'" *Flast v. Cohen*, 392 U.S. 83, 96 (1968) (*quoting C. Wright*, Federal Courts 34 (1963)). Under Article III, this Court has long held that it lacks authority to provide such advisory opinions. "Early in its history, this Court held that it had no power

to issue advisory opinions, and it has frequently repeated that federal courts are without power to decide questions that cannot affect the rights of litigants in the case before them." *North Carolina v. Rice*, 404 U.S. 244, 246 (1971) (citations omitted).

Amici, California State Association of Counties, League of California Cities, and California School Boards Association ("California Amici") argue that the Supreme Court is entitled to consider "antecedent issues" raised by the Amici, even if such issues were not considered by the courts below. *See* Brief of California Amici 7-10. *See also* Brief of Amici Los Angeles County District Attorney on Behalf of Los Angeles County, the California District Attorneys Association, the National District Attorneys Association, and the Arizona Prosecuting Attorneys' Advisory Council ("Los Angeles County Amici") 6-7. The California Amici argue that the issue of whether "absent egregious circumstances, public school interviews of suspected child abuse victims that are conducted by a social worker or a peace officer do not implicate the Fourth Amendment at their inception,"[5] *id.* at 7 (heading

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5. These Amici misstate the court of appeals' holding, asserting that it "creat[ed] a *per se* rule that all public school interviews of suspected child abuse victims by law enforcement implicate the Fourth Amendment," Brief of California Amici 5, while the Ninth Circuit's holding framed the issue the opposite way, considering "whether an in-school seizure and interrogation is *always permissible* under the Fourth Amendment . . . ." *Greene*, 588 F.3d at 1021. It held only that general law of search warrants – under which not every interview is a seizure – applies to child abuse investigations. *Id.* at 1030. The Los Angeles County amici and the United States similarly misapprehend the court of appeals' holding. *See* Brief of Los Angeles County Amici 5; United States Brief 8.

capitalization omitted), can be considered by the Court – although not contested by the parties here or in the circuit court – because it is an "antecedent issue." *Id.* at 9.

The California Amici cite *Teague v. Lane*, 489 U.S. 288, 300 (1989) and *Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691, 697 (1984) as cases in which the Court considered issues raised by Amici but not parties. *See* Brief of California Amici 8. *See also* Brief of Los Angeles County Amici 7 (*citing Teague*).

In *Teague*, the Court considered an argument raised only in an amicus brief because the argument involved retroactivity questions, such questions had been briefed by the petitioner and respondent, and in prior cases the Court had addressed retroactivity of new rules of law *sua sponte* even though not raised in the lower courts or in the question presented for certiorari. *Id.* at 300-301.

In *Capital Cities*, the Court considered a federal preemption issue raised by amicus Federal Communications Commission where the conflict between state and federal law was plainly raised in the complaint, the district court had acknowledged the issue and made the necessary factual findings to resolve it, and the parties were given the opportunity to further brief it. *Capital Cities*, 467 U.S. at 697.

None of the authorities cited by Petitioner's Amici supports issuance of an advisory opinion on matters that were neither contested nor briefed by the parties before the court of appeals or this Court.

## II. Petitioners lack standing to bring the present appeal because they have not shown that they were personally injured by the circuit court's holding or that Supreme Court review will redress any injury.

Petitioners lack standing to bring the present appeal. They prevailed in the underlying action and face no liability. Respondent has not appealed the decision of the court of appeals affirming the district court's summary judgment in favor of Petitioners. Review by this Court would not serve to redress any injury. Consequently, the petitions should be dismissed as having been improvidently granted.

Neither Petitioner has alleged in his briefing that he retains a personal stake in the litigation. Neither faces liability for the seizure of S.G. nor avers that he continues to seize children in public schools under the same circumstances. Certainly neither individual points to any record evidence that he is likely to do so. *See Bender v. Williamsport School District*, 475 U.S. 534, 546 & n.8 (1986) (facts "showing existence of a justiciable 'case' or 'controversy' under Article III[] must affirmatively appear in the record.").

"The standing Article III requires must be met by persons seeking appellate review, just as it must be met by persons appearing in courts of first instance." *Arizonans for Official English v. Arizona*, 520 U.S. 43, 64 (1997). In order to maintain an appeal, Petitioners must demonstrate that: (1) they are personally "aggrieved" by the ruling or judgment being appealed; (2) their injury is linked to the ruling being appealed; and (3) a favorable appellate decision is likely to redress their injury. *See Bender*,

475 U.S. at 542-44. Petitioners are not aggrieved – they won the case below. The court of appeals' ruling upheld summary judgment in their favor, and Respondent did not appeal. A favorable appellate decision cannot redress any injury; Petitioners cannot be any less liable for their actions vis-à-vis S.G. than they are under the court of appeals' decision.

At least one appellate court has held that parties who prevail on qualified immunity grounds lack the requisite injury or grievance for an appellate court to redress, and thus, lack standing to maintain an appeal. *Dixon v. Wallowa County*, 336 F.3d 1013, 1020-21 (9th Cir. 2003). The officials in *Dixon* prevailed at trial on the issue of qualified immunity but appealed the district court's failure to grant summary judgment in their favor. *Id.* Although the court of appeals agreed that the officials might have been aggrieved by being subjected to trial, citing *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985), that damage could not be redressed. Here, the district court granted summary judgment in favor of Petitioners; they were not subjected to trial. As in *Dixon*, Petitioners are not entitled to review of the legal analysis employed by the court below because appellate review would not result in cognizable relief to them. If this Court reverses the Ninth Circuit's Fourth Amendment determination, nothing changes with respect to the outcome of the case against Camreta and Alford.

Petitioners have not cited any authority which establishes that either of them has standing to pursue this appeal. Petitioners argue that *Bunting v. Mellen*, 541 U.S. 1019 (2004), and *Pearson v. Callahan*, 129 S. Ct. 808 (2009), permit review of the Ninth Circuit's constitutional

determination. Camreta Brief 41-43.[6] But this Court in *Bunting* denied review. The concurring Justices reasoned that the Court lacked jurisdiction, as the court of appeals had determined that the petitioner was entitled to qualified immunity and respondents did not challenge that ruling, exactly as in this case. *See Bunting*, 541 U.S. at 1020 (Stevens, J., concurring). Justice Scalia's dissent, cited by Petitioners, agreed that "it is questionable whether Bunting's request for review can be entertained, since he ***won judgment*** in the court below." *Id.* at 1024 (Scalia, J., dissenting) (emphasis in original). Further, Justice Scalia indicated that the procedural tangle should be resolved "either [by] mak[ing] clear that constitutional determinations are ***not*** insulated from our review . . . or else drop any pretense at requiring the [*Saucier*] ordering in every case." *Id.* at 1025 (emphasis in original).

Contrary to Petitioners' argument, *Pearson* did not overturn settled precedent and provide prevailing parties with a right of review; instead it overruled *Saucier v. Katz*, 533 U.S. 194 (2001), in part to escape *Saucier*'s "depart[ure] from the general rule of constitutional avoidance." *Pearson*, 129 S. Ct. at 821. Although Petitioners here complain that some decisions may be unreviewable, the Court in *Pearson* made clear that "most of the constitutional issues that are presented in § 1983 damages actions . . . also arise in cases in which that [qualified immunity] defense is not available, such as criminal cases and § 1983 cases against a municipality," *Pearson*, 129 S. Ct. at 822. Indeed, this case might present just such an opportunity for review,

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6. Alford adopted Camreta's arguments concerning whether the Court can review the court of appeals' decision in their favor. *See* Alford Brief 4 n.1.

as Respondent made a *Monell* claim against Deschutes County, Alford's employer, and Deschutes County obtained summary judgment by claiming that Alford's actions were not pursuant to policy or practice. *Greene*, 2006 U.S. Dist. LEXIS at *13-14, 25. Deschutes County, writing for Alford, now claims that "[t]he seizure in this case was undertaken pursuant to Oregon's child welfare statutes,"[7] Alford Brief 29, and describes Alford's actions with respect to S.G. as "a routine investigative technique used by law enforcement and child protection agencies" in Oregon and elsewhere. Alford Petition 14.

Neither *Bunting* nor *Pearson* alters the requirements for Article III standing or establishes that a petitioner who has prevailed on the basis of qualified immunity has standing to pursue a further appeal.

Other instances in which this Court has declined review because the petitioner prevailed in the court below dictate that the writ should be dismissed in this case. For example, in *California v. Rooney*, 483 U.S. 307, 311 (1987), the Court refused to review a judgment in favor of the state where the California Court of Appeals reached its decision through analysis that was "adverse to the State's long term interests." In *Rooney*, the trial court dismissed illegal gambling activity charges against respondent after finding a Fourth Amendment violation. *Id.* at 309-310. On appeal, the California Court of Appeals *agreed* with the

7. Since the granting of the Writ in this case, Respondent filed a motion with the district court seeking relief from the judgment in favor of Deschutes County based on the County's assertions on behalf of Alford before this Court. The district court denied the motion due to the pendency of these proceedings, indicating that it may take up the issue if the case is remanded. Dkt. No. 139.

trial court that a search of a communal trash bin outside respondent's home was unreasonable and that the evidence from that search was properly excluded. *Id.* But the Court of Appeals *disagreed* with the trial court's finding that without the evidence from the trash, police otherwise lacked probable cause to secure a warrant to search Respondent's apartment, where police found additional incriminating evidence the State sought to use at trial. *Id.* Instead, the Court of Appeals held that the additional information proffered by police to support the search warrant application carried enough independent weight to furnish probable cause to search the apartment. *Id.* The State – but not the respondent – sought review before this Court, which granted the writ of certiorari, *id.* at 310-311, but after oral argument the Court dismissed the writ as improvidently granted. *Id.* The Court explained that the court of appeals could have avoided the constitutional question of the trash search altogether, while still reaching the merits of the constitutionality of the search of Respondent's apartment and his arrest; the judgment of the California Court of Appeals was "entirely in the State's favor." *Id.* at 311. "'This Court 'reviews judgments, not statements in opinions,'" even when a lower court's analysis "may have been adverse to the State's long-term interests." *Id.* (quoting *Black v. Cutter Laboratories*, 351 U.S. 292, 297 (1956)).

Just as in *Rooney*, Petitioners here received a judgment in the court below that was "entirely in their favor" and were the prevailing parties. Also like *Rooney*, the circuit court here was not required to address, and thus could have avoided, the constitutional question of the in-school seizure and instead proceeded directly to the question of qualified immunity. *Rooney* expressly

precludes a prevailing party from seeking review in the Supreme Court where the analysis in the court below was "adverse" to the petitioning party's "long term interests," even if it constitutes binding precedent in that jurisdiction. *Id.* at 311-313. By seeking review, Petitioners ask this Court to skirt this critical principle of constitutional law.

Petitioners contend that this Court's review is mandated because the Ninth Circuit weighed in on a constitutional question it need not have reached. Petitioner claims that the judgment below on qualified immunity grounds should not prevent review of the constitutional question "particularly [because] the Ninth Circuit was not compelled to reach the constitutional issue but nevertheless did so to provide 'guidance to those charged with the difficult task of protecting child welfare within the confines of the Fourth Amendment." *Camreta Petition* at 26. *Rooney* forecloses this argument as well. 483 U.S. at 311 ("That the Court of Appeal even addressed the trash bin issue is mere fortuity; it could as easily have held that since there was sufficient evidence to support the search even without the trash evidence, it would not discuss the constitutionality of the trash search.").

The Ninth Circuit's discussion of a constitutional precedent does not require this Court's review independent of all other requirements and in violation of the parameters for an Article III court. Petitioners erroneously argue for reviewability because the court of appeals "expressly" intended to "create constitutional precedent." *Camreta Petition* at 28. Petitioners' reading of *Pearson v. Callahan* is incorrect. *Pearson* overturned the rule previously established in *Saucier v. Katz*, 533 U.S. 194 (2001) that required courts to consider a civil rights plaintiff's

constitutional claims before addressing whether a defendant is entitled to qualified immunity. 129 S. Ct. 808 (2009). The *Pearson* Court modifies the *Saucier* rule by allowing federal district and appellate courts, in their discretion, to review the qualified immunity issue first and thereby potentially avoid having to reach the underlying constitutional question in cases not well-suited for review of that issue. 129 S. Ct. at 820. However, *Pearson* does not hold, or even intimate, that a prevailing party could seek review of a collateral adverse constitutional ruling whenever a trial or appellate court opts not to review the qualified immunity issue first but proceeds to reach the underlying constitutional question as the Ninth Circuit did in the instant case. And *Pearson* certainly did not authorize appeals whenever a prevailing party desires to rectify an adverse ruling that has been rendered moot by qualified immunity.

Only the United States, writing as amicus curiae, so much as makes a nod in the direction of the standing inquiry. Without citation to anything in the record, the United States contends that "Petitioners in this case have standing because it effectively prohibits them from job-related activities in which they would otherwise engage." Brief for United States as Amicus Curiae Supporting Petitioners ("U.S. Brief") 9. *See also id.* 16 (court of appeals' ruling "prevents petitioners from engaging in a 'routine investigative technique,'" citing Alford Petition 14 and Camreta Petition 11).[8] But Camreta and Alford's briefs contain no averment that either is likely to conduct

8. Neither petition for certiorari cites record evidence in support of the routine nature or frequency of interviews such as that of S.G.

such an interview in the future, nor does the record appear to contain any such evidence.

The United States cites *Deposit Guaranty National Bank v. Roper*, 445 U.S. 326, 334 (1980) for the proposition that in certain instances the prevailing party may appeal from an "adverse ruling collateral to the judgment on the merits." U.S. Brief 15. However, the holding in *Deposit Guaranty* does not alter the requirement that a petitioner must meet the standing requirements of Article III. In fact, the Court in *Deposit Guaranty* held that such a collateral appeal will be permitted only "so long as that party retains a stake in the appeal satisfying the requirements of Art. III." *Deposit Guaranty*, 445 U.S. at 334. In *Deposit Guaranty*, the Court recognized that Petitioners seeking to appeal denial of class action certification had standing to seek an appeal, as they had alleged an individual interest and a personal stake in the outcome of the appeal. 445 U.S. at 336-37. Such is not the case here, as Petitioners have no personal stake in the outcome of the appeal – Petitioners are shielded by qualified immunity.

The United States also argues that review is permitted under *Electrical Fittings Corp. v. Thomas & Betts Co.*, 307 U.S. 241 (1939). U.S. Brief 16. In *Electrical Fittings*, the Supreme Court granted review sought by a successful defendant in a patent infringement case in which the decree of judgment purported to judge the validity of a patent claim in favor of the plaintiff, although that issue was not necessary to the judgment in the case. *Id.* at 242 ("here the decree itself purports to adjudge the validity of claim 1, and though the adjudication was immaterial to the disposition of the cause, it stands as an adjudication of

one of the issues litigated.") *Cf.* Fed. R. Civ. P. 58(a). *See also* Docket Nos. 89, 90 (J.A. 7). The Court in *Electrical Fittings* indicated that it had jurisdiction "to entertain the appeal, not for the purpose of passing on the merits, but to direct the reformation of the decree." *Id.* According to the Court in *Deposit Guaranty*, "In a sense, the petitioner in *Electrical Fittings* sought review of the District Court's procedural error." *Deposit Guaranty*, 445 U.S. at 335 n.7. Perhaps more importantly, the validity of the unexpired patent claim in *Electrical Fittings* remained live because the validity of that exact patent claim could be the subject of further litigation. The seizure of S.G. by Petitioners, a one-time event that occurred in 2003, presents no such ongoing issue applicable to parties and non-parties alike. Unlike the issue of validity of a given patent claim, every future interview of a child at school will necessarily be distinguishable.

## III. The case should be dismissed as moot

### A. Petitioners and Respondent Lack a Personal Stake in the Appeal

It is a fundamental principle of constitutional law that this Court decides only live cases and controversies and will not consider the merits of a moot appeal. U.S. Const. Art. III.; *see also Lewis v. Continental Bank Corp.*, 494 U.S. 472, 477 (1990). As the Court has recognized, Article III of the Constitution requires that an appeal be dismissed as moot when the parties can no longer claim a legally cognizable interest in the outcome, or when it becomes impossible for the court to grant any effective relief. *Lewis*, 494 U.S. at 477. To avoid having a case dismissed as moot, "it is not enough that a dispute was

very much alive when suit was filed, or when review was obtained in the Court of Appeals." *Id.* Rather, the parties must at all times have a "personal stake in the outcome of the lawsuit."[9] *Id.*; *see also Arizonans for Official English v. Ariz.*, 520 U.S. 43, 68 (1997) (describing mootness as "'the doctrine of standing set in a time frame: The requisite personal interest that must exist at the commencement of litigation (standing) must continue throughout its existence (mootness).'").

Regardless of how the Court resolves the one substantive question before it – whether the in-school seizure of S.G. was constitutional – the Court will not grant any party any effective relief as is required by Article III. Specifically, because Respondent did not appeal the court of appeals decision granting Petitioners qualified immunity, *Greene v. Camreta*, 588 F.3d 1011 (9th Cir. 2009), *cert. granted*, 2010 U.S. LEXIS 8024, S.G. cannot prevail on her claim for damages under § 1983; she has no "personal stake" in the outcome of this appeal. Likewise, Petitioners lack a personal stake in the outcome because they prevailed in the judgment below. *Greene*, 588 F.3d at 1033; *Rooney*, 483 U.S. at 311 (dismissing petition for certiorari as improvidently granted where petitioner who prevailed in court below sought review based on

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9. Petitions for review may be dismissed by this Court as having been improvidently granted. *Id.* at 684. Dismissal on this ground may occur at any time, even after oral argument. *See Iowa Beef Packers, Inc. v. Thompson*, 405 U.S. 228, 229-230 (1972). Likewise, claims of mootness may be raised at any time by the reviewing court, *see e.g. Montana v. Imlay*, 506 U.S. 5, 5 (1992) (Stevens, J., concurring), by a party, *see Taylor v. McElroy*, 360 U.S. 709, 710 (1959), or by an *amicus curiae*, *see e.g. County of Los Angeles v. Davis*, 440 US 625, 642 (1979) (Powell, J., dissenting).

lower court's "adverse" reasoning); *Alvarez*, 130 S. Ct. at 580-81 (remanding for dismissal where plaintiffs' specific property claims had been resolved, notwithstanding ongoing dispute concerning constitutionality of hearing procedures in question).

Petitioners' analysis simply fails to understand the significance of leaving the court of appeals' decision unreviewed. If this Court were to find that Petitioners' actions were in violation of the Fourth Amendment, as the court of appeals did, qualified immunity would prevent S.G.'s suit from continuing against Petitioners. If this Court were to disagree with the court of appeals and find no Fourth Amendment violation, the district court's summary judgment ruling would still stand, and the outcome of the court of appeals' ruling upholding the dismissal would still stand. The result of the underlying case changes in neither circumstance.

This Court has on several occasions dismissed a claim as moot because, due to intervening events, a party no longer has a stake in the outcome. *See, e.g., Lewis v. Continental Bank Corp.*, 494 U.S. 472 (1990) (case mooted by federal legislation that eliminated an out-of-state bank's Commerce Clause challenge to the denial of its application for a banking license); *Spencer v. Kemna*, 523 U.S. 1 (1998) (case mooted where petitioner's completion of his prison sentence eliminated alleged collateral harm caused by decision to revoke his parole). Similarly, in the one case reviewed by this Court where the petitioner prevailed in the court below based on qualified immunity, this Court dismissed the claim as moot. *Bunting v. Mellen*, 541 U.S. 1019, 1019-20 (2004) (Stevens, J., concurring) (denying the petition for certiorari where petitioner, former head of

military school, sought review of trial court holding that mandatory daily supper prayer violated the Establishment Clause where court below had entered judgment in favor of petitioner on qualified immunity grounds). As in *Bunting*, this Court lacks the power to alter the parties' rights in this dispute. Like *Bunting*, Petitioners prevailed in the Court of Appeals based on qualified immunity; also like *Bunting*, Petitioners seek review in the Supreme Court of the Court of Appeals' adverse constitutional ruling. As in *Bunting*, the Court should dismiss the writ as improvidently granted in this case.

### B. The Oregon Laws Relied Upon By the Ninth Circuit and Petitioners Have Been Revised

Petitioners' claimed fears about the effects of the court of appeals' opinion on the conduct of future investigations appear to be moot. Alford concedes in his brief that "[t]he statutes and regulations at issue in this case have undergone revisions since these events occurred." Alford Brief 8 n.3. Alford devotes a substantial part of his brief to these statutes. *See* Alford Brief 8 n.3, 29-33, 40, 42 and 63. *See also* Camreta Brief 3, 4, 26, 28, 33, 43. Yet the court of appeals addressed only whether Oregon's relevant statutes and regulations at the time of the investigation triggered a "special needs exemption" from normal warrant or warrant-exception requirements. Alford fails to explain the subsequent changes to the statutes and regulations. For example, Alford cites Or. Rev. Stat. § 418.747, but there is no citation – or even assertion – that his and Camreta's actions with respect to S.G. complied with the written protocol requirements of subsection (2), the training requirements of subsection (3), or the limited authority to proceed in absence of all required

personnel "only for as long as reasonable danger to the child exists" as set forth in subsection (5). Or. Rev. Stat. § 418.747. *See also* Alford Brief 42 & n.27.[10] The changes in the regulatory regime, which are not explained by Petitioners, provide another reason that certiorari should be dismissed because the appeal is moot.

## IV. The Court Should Dismiss the Petition as Improvidently Granted for Prudential Reasons

This Court should dismiss the Writ of Certiorari as improvidently granted for prudential reasons even if it concludes that the case remains justiciable. The Ninth Circuit's decision below represents neither a conflict among the circuits nor a deviation from precedents of this Court.

Camreta contended in his petition for certiorari that the "Circuit Courts of Appeal are divided," Camreta Pet. at 22, and cites *Gates v. Texas Dep't of Protective & Regulatory Servs.*, 537 F.3d 404, 429 (5th Cir. 2008), *Tenenbaum v. Williams*, 193 F.3d 581 (2d Cir. 1999), *Doe v. Bagan*, 41 F.3d 571 (10th Cir. 1994) and *Darryl H. v. Coler*, 801 F.2d 893 (7th Cir. 1986). Camreta Pet. at 24. However, there is no direct conflict among the circuits on the issue of whether law enforcement personnel must comply with warrant/probable cause in child abuse investigations, as contrasted to investigations conducted *solely* by child welfare personnel without law enforcement involvement.

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10. If Alford contends that his participation was in compliance with the current regulatory scheme in this context, such contention would appear to undermine Deschutes County's summary judgment based on lack of policy or practice in its investigation. *See supra* Section III above.

In *Gates*, caseworkers took the children to a specialized central facility "created with the purpose of reducing trauma to the possible victims of child abuse by coordinating child abuse investigations among the various branches of government" pursuant to a specific state statute. 537 F.3d at 432. The Fifth Circuit held that "before a *social worker* can remove a child from a public school for the purpose of interviewing him in a central location without a court order, the *social worker* must have a reasonable belief that the child has been abused and probably will suffer further abuse upon his return home at the end of the school day"; the court found that authorities had violated the Fourth Amendment but were entitled to qualified immunity. *Id.* at 433-34 (emphasis added). *Gates* did not hold that warrantless seizure of a student could be acceptable where, as here, several days passed between the report of possible abuse to the caseworker and the interview of the child at school. The seizures addressed in *Darryl H. v. Coler*, 801 F.2d 893 (7th Cir. 1986), and *Doe v. Bagan*, 41 F.3d 571 (10th Cir. 1994) were also performed solely by caseworkers and did not resemble criminal investigations. *Bagan* relied on the lack of evidence "to suggest that the interview with Bagan involved any of the raiments of arrest . . . this was simply an interview by a caseworker incident to an ongoing child abuse investigation." *Id.* at 575 n.3.

The absence of a direct conflict between circuits militates against review. *See Bunting*, 541 U.S. at 1021 ("The second reason justifying a denial of certiorari is the absence of a direct conflict among the Circuits," distinguishing decisions from different circuits.) *See also Singleton v. Commissioner*, 439 U.S. 940, 945 (1978) ("With respect to the Court's action in this case, the

absence of any conflict among the Circuits is plainly a sufficient reason for denying certiorari."); Supreme Court Rule 10(a).

## CONCLUSION

Petitioners, who prevailed in the district court and court of appeals, have nothing to lose through this Court's review of the matter: the district court's judgment in their favor has not been appealed. Likewise, Respondent has nothing to gain. Thus, this case presents only an opportunity for the Court to engage in a legislative function and issue an advisory opinion that may have vast unintended consequences. Amicus curiae Legal Services for Children requests that this Court dismiss the petitions for review as improvidently granted.

Respectfully submitted,

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